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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. GILBERT JUAREZ, Defendant and Appellant.	B211487 (Los Angeles County Super. Ct. No. BA306021)
In re GILBERT JUAREZ, on Habeas Corpus.	B214808 (Los Angeles County Super. Ct. No. BA306021)

APPEAL from a judgment of the Superior Court of Los Angeles County, Rand Steven Rubin, Judge. Affirmed.

ORIGINAL PROCEEDING; petition for a writ of habeas corpus, Rand Steven Rubin, Judge. Petition denied.

Kenneth H. Lewis and Stephen G. Rodriguez for Defendant, Appellant and Petitioner.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, James William Bilderback II, Supervising Deputy Attorney General, and Roberta L. Davis, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted Gilbert Juarez of committing a lewd act upon a child under 14 years of age, with enhancements for infliction of great bodily injury, substantial sexual conduct with the victim, and personal infliction of great bodily injury on the victim. Juarez argues that the trial court (1) erred in admitting some evidence and excluding other evidence, (2) should have excluded the victim's parents from the courtroom, and (3) made errors in its instructions to the jury. He also argues that the verdict was not supported by substantial evidence. In both Juarez's appeal and his consolidated petition for writ of habeas corpus, Juarez argues that his trial counsel provided ineffective assistance. We affirm the judgment and deny the petition for habeas corpus.

FACTS AND PROCEDURAL BACKGROUND

An information filed May 16, 2007 charged Juarez with one count of committing a lewd act upon a child under the age of 14 years, in violation of Penal Code section 288, subdivision (a).[1] The information also alleged enhancements: that Juarez inflicted great bodily injury on the victim, under section 12022.8; that he personally inflicted the great bodily injury, under section 12022.7, subdivision (a); that he engaged in substantial sexual conduct with the victim, under section 1203.066, subdivision (a)(8); and that under section 667.61, subdivisions (a), (b), and (e), he personally inflicted great bodily injury on the victim in the commission of the offense, in violation of sections 12022.53, 12022.7, or 12022.8.

Juarez pleaded not guilty and denied the special allegations. After trial, a jury convicted Juarez on January 18, 2008 and found all the special allegations to be true. The

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[1] All subsequent statutory references are to the Penal Code, unless otherwise indicated.

court sentenced Juarez to 15 years to life on the substantive count, under section 667.61, subdivision (b). Juarez timely appealed and filed a related habeas corpus petition, which we consider concurrently with his appeal.

I. Prosecution evidence

A. Dawn M.

The prosecution's first witness was Dawn M., the mother of victim Erin M.[2] Erin M. was born in August 1997, and was 10 years old at the time of trial. Juarez was a good friend of Dawn M. and her husband. Erin M. was in special education classes in school for speech and language, and had some issues with her fine motor skills, for which she received therapy. When Erin M. was younger, she had problems with her short-term memory, but "we just don't have that problem with her anymore."

Dawn M.'s family met Juarez's family through mutual friends, Richard and Katherine Fidermutz. Dawn M. and her husband John M. had asked Juarez to be godfather to Erin M.'s older sister, Krysta M., who was 14 at the time of trial. Juarez had two children, Megan and E.J.; Krysta M. was best friends with Megan. Erin M. and Krysta M. often spent the night with Megan and E.J., and the last time Erin M. slept over was in April 2006. Krysta M. did not go, and Erin M. stayed at Juarez's house from April 10, 2006 to April 15, 2006, her spring break from school.

The Saturday after Erin M. came home from the visit, she complained to Dawn M. that "she was hurting down below." Dawn M. told her to take a warm bath, and when Erin M. came back in she was crying. Dawn M. put a towel down on Erin M.'s bed, had her lie on it, and could see that "she was covered in blisters" on her vaginal area and her thighs. Dawn M. asked her "if anybody had touched her there, and she just said, Gil licked me there. And I said, what? And then she told me again—I must have asked her probably 10 times, and finally she took her tongue and she stuck her tongue out and

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[2] We use last initials to protect the identity of the victim, who was eight years old at the time of the offense and ten years old at the time of trial. We also use initials for Juarez's younger daughter E.J., as there was testimony at trial regarding possible sexual abuse of her as well.

started acting out what he did to her." The only "Gil" that Dawn M. or Erin M. knew was Juarez.

Dawn M., who was hysterical, called Katherine Fidermutz, who was away in Big Bear. It was evening, and Dawn M. decided to wait until the next day to go to the doctor so that Katherine could come with her, but when Katherine was not back the next morning, Dawn M. took Erin M. to Kaiser Urgent Care. A doctor took a culture of Erin M.'s blisters, and told Dawn M. to wait for the results. On April 26, however, Dawn M. took Erin M. to a pediatrician, because the blisters were severe and were not clearing up.

The pediatrician, Dr. Carol Welles, pulled the culture results, and asked Dawn M. if anyone in her family had cold sores. Dawn M. said no. In Dawn M.'s presence, Dr. Welles asked Erin M. if anybody had done anything to her, and Erin M. said "Gil licked her down there." Dr. Welles told Dawn M. that Erin M. had herpes simplex 1, the common cold sore. No one in Dawn M.'s family had cold sores, she did not know anyone who did, and Erin M. had never had a cold sore. Dr. Welles called the police, and a sexual assault response nurse questioned Erin M. in Dawn M.'s presence. Erin M. showed the nurse what had happened using a stuffed animal, and also identified where she had been licked on a drawing of a girl.

Since then, Erin had not had cold sores on her genital area, although she had had some on her mouth. Dr. Welles had put her on an oral medication. None of the outbreaks were as severe as the first.

Dawn M. was very angry and hurt, because she had trusted Juarez so much and because Erin M. had to live with it. Dawn M.'s mother, Erin M.'s grandmother, had died the previous January. Around the time that Erin M. had spent the night at Juarez's home she had been having nightmares, climbing into bed with her parents, and refusing to go over to the Juarez home. At the time, Dawn M. thought Erin M.'s behavior was related to the death of Erin M.'s grandmother. She encouraged Erin M. to go over because Juarez would buy tickets to Disneyland and it was expensive. Before Erin M. told her about the abuse, Dawn M. considered Juarez her very good friend.

On cross-examination, Dawn M. testified that Krysta M. enjoyed going over to the Juarez's home and had never complained about inappropriate touching. Dawn M. had never been tested for herpes and no one in her family had had cold sores. Erin M. had had "itchy tongue" which was treated with mouthwash. The doctors believed it was a food allergy. Defense counsel read into the record Dawn M.'s preliminary hearing testimony that around the time of Erin M.'s grandmother's death, Erin M. "would put her hands down her pants and she was trying to itch or scratch or something," although Dawn M. also testified that Erin M. never scratched her vaginal area. Dawn M. had waited until the next day to take Erin M. to the hospital because she needed support. She denied that she took Erin M. and Krysta M. over to the Fidermutz home that night and left them there to spend the night.

On redirect, Dawn M. testified that the Department of Children and Family Services (DCFS) had been called to her home when Erin M. was born in August 2000, and that after interviewing Krysta, the Department determined there was no merit to an allegation that Dawn M. had slapped Krysta M. in the mouth. There was no further contact with child services. Dawn M. had not called the police immediately because she first wanted to find out the medical cause of the blisters, and she did not want to make an unfounded allegation. The "itchy tongue" Erin M. had complained about had gone away when Erin M. had stopped eating citrus. Erin M. was taking some oral medication for the herpes which decreased the severity of outbreaks.

B. Erin M.

Erin M., the victim, was the next witness. She testified that the defendant's name was "Gil," and that she couldn't think of anyone else named Gil. She used to play with Juarez's daughter E.J., spent time at Juarez's home, and would go places with the family. Erin M. remembered spending the night at Juarez's house in April last year, but she had not been there since because "he went to my bed and licked my bottom," pointing to her vaginal area. She had had on a shirt, but no pants or underwear.

When Erin M. slept at Juarez's house, she would sleep in E.J.'s bed, and E.J. would sleep with Juarez and his wife. Megan would be in the room with Erin M., and

she was there the night that Juarez licked Erin M., although Megan was asleep. Erin M. slept at the Juarez house with her underwear off, although at home she kept it on. Erin M. said she first told her mother, then the doctor, and then the police, about what had happened. She had also talked to a nurse at Northridge. Erin M. knew the difference between the truth and lies. She was sure that Juarez had licked her. No one else had ever done that to her.

On cross-examination, Erin M. stated that she had trouble remembering things. At the Juarez house, she would sleep in a trundle bed next to Megan, and Megan was sleeping there that night. The house was small. Music was playing on a radio in the room that night. She did not remember whether she had had rashes on her body before. Erin M. thought she stayed with her mother the night her sores were discovered, although she wasn't sure. Defense counsel read into the record Erin M.'s statement at the preliminary hearing that the door to the room was open. When asked, "This happened to you, this licking?" Erin M. answered "Yes." The lights were off, and the door was open. She did not remember any other times this had happened, although she thought she told the police that it had happened more than once.

On redirect examination, Erin M. testified that she had trouble remembering things that happened long ago, and might think something happened but not remember everything about it. She remembered being in the bath, that it hurt, that she got out of the bath to tell her mom something was wrong, and that she told her mom that Gil licked her. Megan was in her own bed, which was right next to the bed occupied by Erin M. Erin M. remembered that she was mad when Juarez did it, that it hurt, and that it happened more than one time, "a lot of times."

C. Mary Ann Lague

The next prosecution witness was Mary Ann Lague, a sexual assault nurse examiner at Northridge. She saw Erin M. on May 25, 2006. After talking to the parents and the police, she interviewed Erin M. alone, but a television monitor in the room allowed the police to observe the interview. While Lague was talking to Erin M., she took some notes and checked boxes on a form, writing a narrative right after the exam.

When she asked Erin M. why she was there, Erin M. replied "I came because a man licked my private." Erin M. said the man was Gil. Erin M. told Lague that she had been in bed, wearing a t-shirt and no underwear (which is not what she usually did at home), when Gil came in, pushed her legs apart, and "licked her private." Erin M. had said Megan was asleep in the room, that it had happened many times, and that she had not wanted to go that time because she knew it would happen again. Erin M. circled the genital area of a drawing of a gingerbread woman, and said "Gil had licked her there, her mom had put medicine there, and the doctor had taken a test there." Erin M. demonstrated on a teddy bear. Lague then did a physical examination, during which Erin M. pointed to her clitoris as where she had been licked. Lague testified that there was redness on Erin M.'s labia but no lesions or sores. There was no DNA test that could tell you who had infected a child with herpes. A child who was sexually molested might show sexualized behavior, have nightmares, or become emotional or withdrawn. An eight-year-old would not know that anyone would lick the vagina or the clitoris.

On cross-examination, Lague testified that she interviewed Erin M. without Dawn M. in the room, with only a child advocate present. Lague had also interviewed Juarez's daughter E.J., who was five at the time, and stated that it was a "red flag" that while E.J. denied having been touched by her father, she also said that she would not be able to talk about that if anyone had touched her. On redirect, Lague stated that E.J. told her that when Erin M. came to her house, Juarez "helped them in the shower and he washed them all over and also in their private parts and it felt really nice," indicating her labia and clitoris during a physical exam performed by another examiner. E.J. also stated that she did not wear underwear to bed.

D. Carol Welles, M.D.

Carol Welles, M.D., testified that she was a pediatrician at Woodland Hills Kaiser Permanente. On April 26, 2006, Dr. Welles saw Erin M., who came in because of irritation in the vaginal area, which was burning and hurting. Cultures had been taken in urgent care a few nights earlier, and Erin M. and her mother wanted to get the results. Erin M. was well-groomed. Dr. Welles performed a physical exam of Erin M.'s vaginal

area and found multiple very small "vesicles or . . . little blisters" in clusters, which made Dr. Welles suspect herpes. Dr. Welles looked up Erin M.'s test results on the computer and found that it was herpes simplex virus type 1.

Dr. Welles had not seen Erin M. before, and asked her whether she had been "bothered in that area, and she disclosed that she had been, and I remember that quite vividly." Erin M. told her "her godfather had touched her in that area." Dr. Welles put out her hand to stop Dawn M. from showing how upset she was, and asked Erin M. to "tell me about it." Erin M. told Dr. Welles that her godfather, Juarez, "would put his mouth against her vagina or vaginal area." Erin M. did not use those words but showed Dr. Welles her vaginal area. Dr. Welles asked where this happened, and Erin M. continued that it happened at Juarez's house when she was babysat, and said "at nighttime, that he would come into her room and that he would remove her underwear and that he put his mouth against her vaginal area." They both had clothes on, and nothing was placed inside her body. Dr. Welles thought "it was very clear from this eight-year-old girl's voice that this was—this was a history that I couldn't ignore, and it was very impressive coming from that age a person, who I would not have assumed to have had the experience to have seen such an act."

Dr. Welles testified that as a pediatrician she treated infections and lesions, including herpes. There were two kinds of herpes, herpes simplex virus 1 ("type 1") which was found in the mouth, to "which most of us have been exposed in our lifetime and most of us would test positive perhaps." Herpes "type 2" is traditionally found in the genital area, although it can be found in the oral area as well. The virus could be easily spread by touch or secretions. The virus could be shed even in the absence of active lesions. Skin-to-skin contact could transmit the virus, for example if the mouth of a person with a cold sore touched another person's mouth, and the virus could be transmitted to chapped or irritated skin. A person could also touch his or her own cold sore and give themselves herpes on another part of their body. A young person touching him or herself "a lot" could self-inoculate, although another person with an oral sore could also inoculate that person, and Dr. Welles did not know which was more common.

For self-inoculation, even without a current active lesion, someone would have had to have had a cold sore in the past. The first outbreak of type 1 herpes was usually very uncomfortable, "not dissimilar to what I saw with Erin." Dr. Welles thought that the sores she saw on Erin M. were similar to a first-time outbreak. If someone self-inoculated type 1 to another part of their body, such as the genitals, that would not be a first outbreak. Dr. Welles stated it was "clear to me that that was Erin's first outbreak, and her mother also denied that she had had anything like this before."

The incubation period from exposure to outbreak was somewhere between 2 and 20 days. The outbreak that Dr. Welles saw on Erin M. was consistent with exposure between April 10 and April 15, 2006. The virus lives in the nerve root, never leaves the person's body, and can become reactivated during certain times. Once infected, a person can spread the virus to others, including to a baby delivered vaginally.

Dr. Welles had reviewed all of Erin M.'s medical records, and saw that a few years earlier in 2004 Erin M. had a white lesion on her tongue, which was cultured and tested negative for herpes simplex. Dr. Welles believed that what she saw was Erin M.'s first outbreak.

On cross-examination, Dr. Welles stated she did not have specific expertise in herpes. She did not know that a person could have type 1 herpes all his or her life and not have an outbreak. She did not have a lot of experience seeing herpes in the genital area of children. She had relied in part on Dawn M.'s statement that Erin M. had not had a previous outbreak. She had tried to stop Dawn M. from sobbing while Erin M. was discussing what had happened. Dr. Welles believed it was "fair to say that the majority of Americans have herpes 1 . . . and they have that for their entire lives." The virus could be transmitted by kissing, mouthing and touching. Type 1 could also be transmitted by touching your mouth and then touching something else, or "self-inoculation," which would be much more possible if there were an active lesion, although that was not absolutely necessary. She agreed that if someone touched their mouth and touched their genitals, and if they were not clean, "they can get herpes down there."

Dr. Welles testified that herpes type 1 and herpes type 2 looked the same and could be distinguished in the laboratory. She agreed that DNA testing could identify the strain of the virus, and that if the strain were the same between two persons, it would be a powerful indication of who the donor was. She did not know whether it would be possible to determine from where the virus came.

On redirect, Dr. Welles testified that the DNA test would show the DNA of the virus, not the donor. No test could show who had given the virus to Erin M. A test could analyze the DNA of the particular strain of the virus, which would narrow it down, but would not show the transmitter of the virus. The DNA strand could be isolated during the first outbreak. Erin M. had subsequent cold sores, and Dr. Welles treated her with the same medication she used for the genital lesions. It was not common to see herpes of any type on the genitals of an eight-year-old child. Dr. Welles generally did not see self-inoculation.

On recross, Dr. Welles stated that poor hygiene could increase the possibility of self-inoculation. She had not discussed with Erin M. or her mother any learning disabilities. She had never seen a cold sore heal in one day.

E. Krysta M.

Krysta M., Erin M.'s older sister, testified that Juarez was her godfather, and that she frequently spent the night over at Juarez's home. The Juarezes told Krysta M. and Erin M. that they could not wear underwear with their pajamas. Erin M. wore a big shirt to bed with no underwear underneath. Krysta M. had never seen a cold sore on Erin M.'s mouth before April 2006. Erin M. did not have a problem with hygiene. Krysta M. had seen the outbreak on Erin M. the day it was discovered and said it looked like a bad case of chickenpox all over the genital area; her mom was upset and crying. She remembered talking that night about what Erin M. said, "that Gil had licked her in the genital area." Krysta M. did not think anyone had tried to implant that idea in Erin M. Juarez had been a close family friend, Krysta M. never heard anyone "bad-mouthing" him, and Erin M. was not a liar.

On cross-examination, she stated that Juarez had never touched her inappropriately. She was close friends with Juarez's daughter Megan. Krysta M. confirmed that she had told the police that Juarez never came into the bathroom while she was bathing. She would give her underwear to the Juarezes at night, they would wash it and other items of her clothing, and give it back to her in the morning. Krysta M. slept in the second trundle bed; the house was very small, and a door from the bedroom leading into the living room was kept open. The Juarezes bedroom was just across the hall. Krysta M. had her first menstrual cycle while at the Juarezes, and Juarez had explained to her what it was with Megan present, using educational videos. The M.'s had boarders in their home. Erin M. had some speech and memory problems when she was younger, but her memory now was good. Krysta M. saw cold sores on Erin M. after the first outbreak, but had never seen Erin M. have hygiene problems. Dawn M. was very upset when Erin M.'s sores were discovered. Krysta M. was sure she and Erin M. had not spent the night at the Fidermutz house that night. Her grandmother had died a few months before and this was an emotional period for the family. Krysta M. had never been tested for herpes, and had never seen a cold sore on her family or on the boarders.

On redirect, Krysta M. stated that she slept in the same bedroom with Megan, who was a pretty heavy sleeper. They could put toilet paper over Megan and she wouldn't wake up. She had never seen cold sores on Erin M. before the genital outbreak. Erin M. did not scratch herself in the genital area. Before Krysta M. got her first menstrual period, she and Dawn M. had gone to a mother-daughter event at the elementary school explaining it. Krysta M. brought extra underwear when she stayed over at the Juarez's house, and was not sure why there was a rule not to wear underwear. The Juarez girls also did not wear underwear.

F. Stipulations

The parties stipulated that Juarez had herpes simplex type 1 and type 2, and that he had both viruses at the time the offenses allegedly occurred. Further, the parties stipulated that Erin M. had herpes simplex type 1 on her genital area.

II. Defense case

A. Katie Fidermutz

Katie Fidermutz (Katie), who was fifteen, testified that Juarez was her "uncle" by friendship, and that she had also been close friends with the M.'s. Krysta M. was her best friend. On April 22, 2006, Dawn M. brought Krysta M. and Erin M. over to the house; Katie and her brothers were there; her parents were out of town. Dawn M. was crying and hysterical but not crazy, stating over and over "I can't believe he would touch my daughter like that. We trusted him." Katie was shocked. After a half hour, Dawn M. left and Erin M. and Krysta M. spent the night. After Dawn M. left, Erin M. walked around and repeated "I can't believe he would touch me." Dawn M. picked up Erin M. the next day. Katie testified that Erin M. rarely took showers and would always touch her private areas, saying that it hurt and itched, and that she never brushed her teeth. Erin M. also had a bad memory.

On cross-examination, Katie testified that her parents did not allow her to talk to the police and that she had not told an investigator that the M.'s had come to her house that night. She had talked to the Juarez family about testifying between one and five times. Katie had not stayed over at the Juarez house for about a year in April 2006. She repeated that Erin M. continually touched herself, in private and in public, so that anyone would notice.

On redirect, Katie testified that Juarez was never inappropriate and she had told her parents that. She stated that defense counsel had emphasized to her the importance of telling the truth.

B. Katherine Fidermutz

Katherine Fidermutz (Katherine), Katie's mother, testified that she was close to Juarez and had been close to Dawn M. She often babysat Erin M. She and her husband were in Big Bear when Dawn M. called on Saturday, April 22, 2006. Dawn M. was hysterical, saying, "Erin had said Gil licked her privates." Dawn M. was a very emotional person, and had taken the death of her mother very hard. Katherine was shocked, and told Dawn M. to take Erin M. to the doctor. Dawn M. wanted Katherine to

go with her, and said she would wait for Katherine to return. Dawn M. called back and asked if she could drop off the girls at Katherine's house. Katherine said okay, then called Katie and asked her if Juarez ever did anything inappropriate. Katie said no. Katherine never told Dawn M. to wait until she returned to take Erin M. to the doctor. She returned late that Sunday night.

Katherine stated that Erin M. was "very slow," and had poor short-term memory. Erin M. was dependent on Dawn's approval. Her hygiene was not good, and she would "scratch her private a lot because her panties were dirty." Erin M. would cup her mouth when she was nervous. In September 2005, Katherine took Erin M. to a Dr. Nichols for sores in her mouth. She believed Juarez was an honest man. He was a "germophobe. . . . All the time in his pockets, he has the sanitizer things. My kids complain he makes you wash your hands all the time."

On cross-examination, Katherine testified she did not babysit Erin M. as much after August of 2005. When shown records from when she took Erin M. to the doctor for her tongue, she did not remember that Erin M. was tested and it came back negative. She stated that Erin M. had had cold sores before the visit, something she did not mention before. She though Dawn M. might have misunderstood what Erin M. said. On Sunday, when she returned from Big Bear, she and her husband went over to the Juarezes' and her husband told them what Dawn M. had said. She was there to protect Colleen Juarez, her best friend. Katherine also stated that Erin M. would have been reluctant to accuse Juarez.

On redirect, Katherine said her children also had cold sores in the past. She went to Colleen Juarez to give her emotional support. She had not wanted to testify, and had been subpoenaed by the defense.

On recross, Katherine said she was friends with Dawn M. "on a different level." Her husband had reported Dawn M. to DCFS when Erin M. was being born. On redirect, Katherine stated that Krysta M. had given her information, and she had contacted Erin M.'s aunt Pat.

C. Steven (Steven) and Jeff Fidermutz (Jeff)

Steven, who was 24, stated that he had been called down to testify from Oregon. Juarez was a family friend. Dawn M. came over on April 22, 2006, and dropped off Erin M. and Krysta M. He was there with his two brothers, two of their friends, and his sister Katie. Dawn M. was crying and said that Juarez had touched Erin M. Erin M., after her mother left, repeated "I can't believe Gil would touch me." The two girls spent the night. Dawn M. picked Erin M. up the next day to take her to the hospital. He thought it was "weird" that someone would drop off their child in that situation, especially in a house with four boys. He had not spoken to anyone from the defense before testifying. He had talked to Colleen Juarez and told her what he remembered while sitting outside the courtroom that morning. Juarez was a very close friend, the best friend of Steven's father. He had talked to his mother and father about his testimony. On redirect, Steven stated that defense counsel had told him to tell the truth.

Jeff, who was 19, testified that Juarez was his godfather. He also remembered Dawn M. coming over that late evening, hysterical and saying "Gil had touched little Erin." Erin M. and Krysta M. had spent the night. He had recently discussed the events of that day with his family, and with Colleen Juarez. He had never seen Erin M. with a cold sore, or with a hand down her pants. He had watched Dawn M.'s testimony before he was called as a witness. Jeff had talked to his sister Katie about the testimony. He wanted Juarez to be acquitted, and after watching testimony, he decided that he had information about which he wanted to testify. He had not known that Dawn M. would say that she did not bring the children over to his house.

D. Beverly Staples

Staples testified that Juarez was a friend of her son and his wife, and that Erin M.'s father John M. was her best friend's brother. In April and May 2006, Staples worked as an assistant in special education. She tutored Erin M. twice a week in April and May. She did not observe any hygiene problems or scratching at the mouth. When Erin M. was five or six, however, Staples observed her touching her private area and then putting her hand up to her face. Although she helped Erin M. with her reading, Erin M. would

memorize the words for the next time: "She had a pretty good memory, that one." Staples also thought she had some short-term memory problems. Once Erin M. started crying hysterically when Staples said no to her. In April and May, Staples never saw Erin M. with any cold sores or inflammation in her mouth.

On cross-examination, Staples stated that her son's best friend was Richard Fidermutz. In April and May 2006 she observed Erin M. to be a very sweet girl who seemed to be honest. Staples never noticed anything inappropriate or unusual about Erin M.'s hygiene, nor did she ever notice a cold sore. Staples had some training in communicable diseases of children under 10, and she would have noted and reported a cold sore or any lesion. When she had seen Erin M. putting her hands on her private area, it was over her clothing. Erin M. could be emotional and antsy.

On redirect, Staples testified that she was amazed how upset Erin M. became on the day she cried when Staples said no.

E. Colleen Juarez (Colleen)

Juarez's wife Colleen testified after the defense introduced into evidence a layout and seventeen photographs of the Juarez home. Colleen Juarez testified that they had been married for 17 years, and that she worked for Los Angeles City Attorney's office as a legal secretary. Colleen had known the M.'s for ten or eleven years, and Juarez was Krysta M.'s godfather. She had had cold sores on her lip, as recently as about two months ago. She had never had genital herpes and her prior outbreak was four or five years ago. The only time she had seen Juarez with a cold sore was in January 2001, when he started working at Disneyland and had a photograph taken for his identification card. She had not had cold sores outside of the two times she mentioned. Her children had never had cold sores. Colleen had tested positive for herpes type 1 and negative for herpes type 2.

When both Krysta M. and Erin M. came to spend the night, Krysta M. would sleep on the trundle bed in the bedroom with Megan and Erin M. would sleep in the living room on the couch. Colleen was shown the layout and the photographs of the house. The house and the girls' bedroom, where Megan had the daybed with the trundle bed and

E.J. had her own bed, were very crowded. The master bedroom opened into the living room.

After the incident in April 2006, Colleen's daughters tested negative for herpes type 1 and type 2, and had a gynecological exam which showed nothing unusual. The house was about 600 square feet, crowded and cozy. During sexual activity, she and Juarez would close the door to the master bedroom. The children's bedroom door did not close. Colleen was a light sleeper who heard everything. She would not get up if she heard Megan walking around or Juarez coming home late from work, she would go back to sleep.

Juarez was "kind of obsessive" about germs. He continually asked the children if they had washed their hands, and carried antibacterial liquid, spray, and wipes. The family regarded it as a joke.

Colleen testified that Dawn M. was very emotional while her mother was dying. Erin M. couldn't read, and would memorize everything, would not brush her teeth, and had a problem dressing herself. The kids at school teased her because of her speech problem, and she had some short-term memory loss. She did not properly clean herself after going to the bathroom and did not wash her hands. Erin M. would put her hands in her mouth because her tongue itched, and then put her hands into her pants and scratch herself, saying that it itched. There was no set policy that the girls could not wear underwear when they slept over, and they would show up with dirty clothing which the Juarezes would wash.

The trundle bed was old and noisy. Colleen's work schedule was 8:30 a.m. to 5:30 p.m., and Juarez worked from 2:00 p.m. or 4 p.m. until 12:00 p.m. or 2:00 a.m. During April 10 to 15, 2006, when Erin M. stayed at the Juarez home, Juarez was off work on some of the days, staying home with the girls, and taking them to Disneyland with him on one day. If Juarez was home at the girls' bedtime, he would read them a story, talk with them, and turn out the lights. Colleen Juarez could hear him reading the story and hear the kids laughing. He would sit on Megan's or E.J.'s bed. Colleen Juarez

had said in a police report that Juarez would lie down with the girls every night, but that was wrong. He would sit on the edge of the bed.

Katherine Fidermutz had called Colleen the night Katherine came home from Big Bear, and she and her husband came over and told Colleen the allegations. Colleen was devastated. Colleen called Juarez and told him that "they're saying that you were inappropriate with Erin," and when Juarez started to cry she told him to come home early so they could talk.

Colleen had seen white sores and blisters inside Erin M.'s mouth two or three times. Erin M. had a sore on her mouth that week. Colleen had commented on it and the M.'s told her it was nothing to worry about; she had not been told there was a food allergy.

Colleen testified it was "easy" to hear things coming from her children's room, and the door was always open. She would hear Juarez coming home and would wait for him in bed. During the April 15-20 time period, she and Juarez had sexual intercourse and engaged in oral sex. Colleen never had an outbreak during that period. She loved her husband but would not lie to protect him. She was very angry that day.

On cross-examination, Colleen testified that she would never want to believe that the molestation allegation could be true. She was intimately familiar with the case, and had reviewed the police reports, had read the preliminary hearing transcripts and transcripts of the trial testimony. She had talked to Juarez about the case, and had discussed strategy.

When the police first contacted Colleen, she did not mention ever having seen a cold sore on Erin M., although she knew that Erin M. had been diagnosed with herpes on her genitals. Colleen knew she herself had had a cold sore, but did not know it was called herpes. She never mentioned, because she was not asked, that Erin M. had cold sores just days before the allegations, or that Erin M. had hygiene problems. When she realized that cold sores on Erin M. were relevant, she called Juarez's counsel.

Colleen also testified that she did not remember reports indicating that both of her daughters had unusual vaginal discharge at the time of their gynecological examinations.

She was concerned about the testimony by the sexual assault nurse that there were some "red flags" during the examination of her daughter E.J. Colleen had asked her daughters if they had ever been touched inappropriately, with Juarez present. She believed her daughters would have told her of any inappropriate behavior even with Juarez there, and that Juarez would tell her if the allegations were true, even though she would take the children and leave.

Juarez was closer to Erin M. than was Colleen. After reading to the children he would sometimes stay in the room until Erin M. fell asleep, which could take up to 45 minutes. Erin M. referred to Juarez as "My Gil." He made sure Erin M. got into the bathtub, although he did not actually bathe her.

Colleen testified that her daughters slept with no underwear; she had been raised that way but would not tell anyone else not to wear underwear. Juarez was a germophobe but would orally copulate her; she took a shower beforehand. Their home had been featured on the TV show "Clean Sweep," which did an entire episode called "Caught in a Mouse Trap" cleaning their living room, dining room, and kitchen. Colleen testified that they were on the show for "clutter," not for "living in a pigsty." She was Krysta M.'s godmother, and Juarez was Krysta M.'s godfather. She and Juarez met the family when Krysta M. and Megan were around 2. The Juarezes helped when Erin M.'s grandmother passed away. She was not aware of any reason why Dawn M. would make something up about Juarez.

On redirect, Colleen testified that she was not angry at Erin M. but at Dawn M. Erin M. strived to please Dawn M., and Colleen held Dawn M. responsible for the prosecution of Juarez. Dawn M. was not a good mother and should have taken better care of Erin M. and should not have been so emotional around her. After she spoke with the police, Colleen's children were taken to a foster home.

On recross, Colleen testified that she had scheduled her daughters for the required examination on the morning after DCFS took the children to be examined. She admitted that she had told the girls that "Erin [M.] had made up a lie," telling them that Erin M. had gone to the doctor twice before she determined something was wrong, and that they

would be interviewed by DCFS, who would ask them questions about their private parts. It did not occur to her that the girls' answers might be affected, and she thought even her five-year old (E.J.) would think for herself. She had never heard Dawn M. lie, but blamed her for the prosecution.

On further redirect, Colleen stated that it would be "insane" for Juarez to have committed the alleged molestation in their house, because of the great potential that he would be discovered. The house is small, "you can hear everything that happens," and it would mean the loss of his family if he were discovered. The light from the living room came into the girls' bedroom and the entire house.

On further cross-examination, Colleen stated that a child with a speech impediment and memory problems might be at greater risk of molestation, but "a child is going to get the message across," although not all children necessarily disclose abuse.

F. Gilbert Juarez

Juarez testified that he worked as a security officer at Disneyland, and that his first and only outbreak of herpes was when he had his picture taken in 2001. Juarez was unaware it was called herpes, thinking that the name only related to genital sores. He did not know he had herpes type 2 until he was tested. He had never had an outbreak of genital herpes. He testified that Erin M. had begged to stay at his house during the time in question, and that he had taken the girls to Disneyland one day. Nothing unusual occurred. He had never touched Erin M. or any other female in an inappropriate manner.

Juarez was very close to Erin M. and tried to help her with her speech impediment and her memory problem. She was unkempt and would often stick her hands in her mouth to scratch her tongue, and had little pustules in her mouth and on her tongue. Juarez associated these with cold sores and told Dawn M. about it. She smelled unclean.

As the "at-home dad," Juarez did the laundry and general housecleaning. The "Clean Sweep" show reorganized their home, calling the episode "Caught in a Mouse Trap" because of the Disney items in the rooms. It was in 2000 or 2002.

Juarez testified that he knew when he was tested that if he did not test voluntarily, he could be forced to test. At the time of the alleged molestation, he weighed 235 pounds

and had no cold sore. Erin M. had a small pimple on her lower right lip that he thought was a cold sore. He testified that the house was so tiny you could hear a sneeze at one end from the other end. He thought the crime was "horrific . . . a terrible, terrible crime." The possibility of discovery, given the house, was very great.

At the time of Krysta M.'s baptism, the M.s accused Juarez of calling DCFS to report that Krysta had been abused by her grandfather, although Juarez had not made the call. This caused a rift between the families.

On cross-examination, Juarez testified that it was not really possible to move around the house without making any noise. He had heard all the testimony and seen all the documents in the case, and had been able to talk to the defense witnesses. He stated that nothing he said could convict him because he did not do it. His most important goal was to avoid conviction, but he was telling the truth, and would never even think of doing what the charge accused.

G. Stanley Bierman, M.D.

The defense had retained Dr. Bierman, a dermatologist who specialized in sexually transmitted diseases and had seen between 1,000 and 2,000 cases involving herpes type 1 and type 2. Herpes type 1 was blistered lesions above the waist; type 2 was below the waist, although type 1 could appear in the genital area whether by oral sex or by autoinoculation. After initial exposure to herpes type 1, a person would develop blisters in the mouth, sometimes an fever, and malaise. The virus then became latent, would reactivate after a variable period of time, and again would produce blisters on the lip. This period of latency and outbreak then would repeat. The subsequent outbreaks were less intense. In many cases, people with the virus had never had an outbreak and did not know they had herpes when they tested positive. Herpes type 2 produces blistered lesions on the genitalia.

Herpes type 1 could be transmitted to the genital area by saliva. It was possible that a person with no symptoms of herpes type 1 could nevertheless be shedding the virus into the salivary glands, so that if saliva got on the hands it could then be transferred to

the genital area. Dr. Bierman had seen patients who had self-inoculated themselves with type 1 herpes in the genital area.

Dr. Bierman had reviewed Erin M.'s medical records. On September 13, 2004, a rash on Erin M.'s tongue was tentatively diagnosed as herpes (he presumed type 1). A culture was taken, and after testing, the result was negative for herpes.

It was not possible to do a DNA test on someone with herpes to determine the donor, nor was it possible to determine whether an outbreak was a first or subsequent outbreak. Given the medical records prior to September 13, 2004, Dr. Bierman testified that there was a reasonable possibility that Erin M. had herpes type 1. Autoinoculation by someone with herpes type 1 would be more likely than poor hygiene.

On cross-examination, Dr. Bierman stated that the virus "maybe" remains in the body for life. The most common form of transmission for herpes type 1 was oral sex. The virus could be transferred through the mucous membranes in the mouth or in the interior of the female genitalia. The incubation of the virus would be five to seven days before cold sores would appear. The Center for Disease Control estimated the incubation period as within two weeks. Dr. Bierman agreed that "if a person was exposed to herpes simplex 1 by having been orally copulated, say, on the 15th of April, [it would] be consistent with the incubation period that you've described for them to have cold sores on the 22nd of April."

Dr. Bierman agreed that the first (primary) outbreak of herpes generally was the most severe. After a primary outbreak of herpes type 1 on the genital area, red marks remaining three or four weeks later were consistent with a first outbreak. Someone who had had a lip cold sore was far less likely to have a genital outbreak of herpes type 1 or type 2, because of the development of antibodies. Further, an outbreak of herpes type 1 in the genital area was generally a primary outbreak. A false negative for herpes type 1 was more likely if the culture tested was taken after the blister had popped, crusted, and begun to heal. If a culture was taken by popping a blister, if there is herpes type 1, it will generally show up in the culture. Also, someone whose first episode is on their lip will generally have future outbreaks in the same location. Self-inoculation only accounted

for .3 percent of all transmission of herpes, and usually occurred during the first outbreak. A child who self-inoculated from the lip to the genitalia could develop "herpetic whitlow," a blister lesion on the finger.

An outbreak of herpes on the genitalia, whether type 1 or type 2, put the person at an increased risk for HIV and encephalitis, and perhaps for cervical cancer. A woman with genital herpes could transmit it to a newborn delivered vaginally. In general, herpes was a substantial disease for a child. Dr. Bierman treated very few children. A case of genital herpes, either type 1 or type 2, was a red flag for child abuse in a child older than three. Dr. Bierman's specialty was dermatology, not infectious disease. He had not examined Erin M., and had relied on the medical records he was given by the defense.

Papules were raised red areas that could be caused by trauma, an irritation, or sensitivity to food. If the papules were caused by herpes, vesicles would later appear. Herpes papules or vesicles would cause pain, rather than itching. Dr. Bierman agreed that the only appearance of vesicles in Erin M.'s medical records was in April 2006 in the genital area. The tongue was a less likely location for a herpes type 1 blister than other areas in the mouth or lips. Asked whether "it is consistent that someone who was exposed to [type 1 herpes] via oral sex between April 10 and April 15th would then come down with the vesicles on April 22nd," Dr. Bierman responded, "It's within the time frame." Self-inoculation in a child was rare, it was rare to have a genital outbreak if an oral outbreak already had occurred, a first outbreak might leave red marks a month later, and autoinoculation generally occurs during the first outbreak.

Dr. Bierman was aware that Erin M. said "Gil licked me," and showed age-inappropriate sexual knowledge. All these facts were consistent with the April 22 outbreak being the first and primary outbreak of herpes type 1.

On redirect, Dr. Bierman testified that he had never come across a case where herpes 1 in the vaginal area was transferred to the mouth. False negatives for genital herpes occurred 50 percent of the time. Dr. Bierman maintained his opinion that there was a reasonable possibility that Erin M. had herpes prior to April 26, 2006. He did not believe she could have self-inoculated from the genital outbreak to her mouth. He

thought that the records showed that Erin M. had a herpetic whitlow on her finger on April 26, 2006, which he believed showed "autoinoculation transference from mouth to finger to genital."

On further cross-examination, Dr. Bierman stated that he did not remember his earlier testimony that he would not expect to see herpetic whitlow. He admitted that he had to testify that Erin M. had self-inoculated to say there was transmission of the virus in any way other than oral sex. He admitted that out of two possible explanations, "the most reasonable explanation for this child having oral herpes on her genitals is that she was orally copulated like she said between April 10 and April 15."

On further redirect, Dr. Bierman again testified that an alternate explanation was self-inoculation by Erin M. On further cross-examination, he once more stated that the best explanation for the outbreak was that Erin M. contracted herpes type 1 on her genitals through oral copulation during the period from April 10 to 15.

III. Closing arguments

The prosecution pointed out that Erin M.'s testimony that "Gil licked me" was consistent from her first statement to Dawn M. to her statements to every other person and her testimony in court. That simple statement explained all the facts of the case: the outbreak of herpes and the lack of evidence that Erin M. had had cold sores before April 2006. Both Erin M. and Dawn M. were credible witnesses with no reasons to lie. In contrast, Juarez's witnesses only came up with their testimony about Erin M.'s poor hygiene and earlier cold sores after talking to the police and after the appointment of an expert tasked with finding any other explanation for the type 1 herpes on Erin M.'s genitals. Even the defense expert admitted that the most reasonable explanation for the outbreak was oral copulation by Juarez between April 10 and April 15, 2006.

Defense counsel emphasized that the jury needed to find Juarez guilty beyond a reasonable doubt, "a certainty, a conviction in your own mind and heart that you are absolutely correct in your decision." Erin M. was disabled, her mother Dawn M. was highly emotional, and a lack of basic understanding about herpes type 1 and type 2 pervaded the case. "Sexual deviancy knows no bounds in reference to morality. It could

be a priest, a corporate executive, a teacher. It could be anyone. There's no question about that. That's why there's no character witnesses here, because that's irrelevant." Nevertheless, the small house and the chance of getting caught made the crime scene important. The prosecution did not present any expert witnesses to contradict Dr. Bierman. Juarez should have been tested immediately after Erin M.'s outbreak was discovered to see if he was shedding the virus. A test for antibodies should have been done on Erin M. to determine if it was her first outbreak.

Erin M.'s disabilities were obvious during her testimony, during which she did not go into detail. Erin M. had also been pressured on the stand. "You're not dealing with a normal young girl who can be very bright, who can sometimes be very decisive and strong."

Dawn M.'s emotionality during Dr. Welles' examination was inappropriate, and Dawn M. lied about taking Erin M. over to the Fidermutzs' house instead of immediately going to the doctor. It made no difference to the case that Dawn M. waited, but her denial had an impact on her credibility. "It's the same reason I think she's in this courtroom many times making faces as the witnesses testify. She doesn't want to look bad."

Dr. Welles was not an expert. Dr. Bierman's testimony was intended to educate the jury about the appropriate tests, and although self-inoculation was rarer, it was possible. One of the doctors thought Erin M. had herpes, and although the culture was negative, false negatives happened 50 percent of the time. There were powerful, reasonable alternatives to the prosecution's theory that Juarez gave Erin M. herpes.

Colleen Juarez and Juarez had testified about their normal lives and their family. The house was small and the trundle bed too squeaky for Juarez to avoid detection. There was no evidence that Juarez was unstable, overly emotional, used drugs or drank, or made offensive remarks. Dawn M., however, lied about taking her daughters over to the Fidermutzs' house, and had "remained in this courtroom the entire time, because there's a strong indication that she has a powerful, undeniable influence over her

daughter." Counsel urged the jury to think independently and to think about reasonable doubt, and "hopefully this nightmare of Mr. Juarez will come to an end."

In rebuttal, the prosecution told the jury to focus on the testimony. Erin M.'s testimony was direct evidence of what happened. The sexual assault nurse's testimony was that there were red flags regarding Juarez's daughter E.J. Dr. Welles was an independent witness, a doctor who did her job. And even if Dawn M. was "the worst mom on earth. . . . How does that make the defendant not guilty?" "[W]hat evidence is there that she coached Erin to say this, that she had a motive to coach Erin to say this, that she had the knowledge to coach Erin to say this?" Katherine Fidermutz's interest was to protect Colleen and Juarez. Erin M.'s disabilities did not make her story less credible, but they did make her "prey to men like Gilbert Juarez." She remembered what had happened to her and had been consistent down the line. As to Dr. Bierman's testimony about a 50 percent false negative test rate, "that 50 percent false-negative rate is for HSV-2, not HSV-1." He was not an unbiased expert. Erin M.'s itchy mouth in 2004 was a food allergy to citrus. The first outbreak was the genital outbreak, and although there was no proof that Juarez was shedding, "that doesn't mean he didn't orally copulate the child." Staples was the only defense witness that had no motive, and she volunteered that she did not notice bad hygiene or a cold sore.

As to Colleen, "you heard a lot of times that Colleen lives in a 600-square-foot house. That ain't where Colleen Juarez lives. Colleen is living somewhere called denial." Colleen asked her children about any abuse in front of Juarez, told them that someone else made up a lie about Juarez, and warned them that someone was going to ask them about abuse, "and that's how you make sure that your kids don't tell." A husband would not admit to this behavior especially when they know the ramifications.

The defense had brought in pictures and a diagram of the tiny house, but "you don't have to be smart to be a felon. . . . [T]he kind of men that commit this crime, it's a compulsion. . . . So you groom a child. You find a child that you're less likely to have reporting, the child who is less likely to be believed. . . . [Y]ou molest them even in close

quarters. People take risks all the time, stupid risks." Erin M.'s testimony and the medical evidence proved the crime beyond a reasonable doubt.

IV. Jury deliberations and verdict

After instructions, the jury began deliberating at 9:16 a.m. on January 18, 2009, and at 4:05 p.m. returned a verdict of guilty on count 1 and all the enhancements.

The court denied Juarez's motion for a new trial on October 10, 2009. The court sentenced Juarez to fifteen years to life in prison, with 297 days of good time, fines, and a security assessment.

DISCUSSION

I. The testimony of the sexual assault nurse, Mary Ann Lague

On his direct appeal, Juarez argues that the portions of Lague's testimony in which she repeated Erin M.'s statements that Juarez had molested her, should have been excluded as hearsay. Juarez's counsel objected on hearsay grounds, and the court admitted the statements as past recollection recorded under Evidence Code section 1237.

Evidence Code section 1237 provides: "(a) Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying, the statement concerns a matter as to which the witness has insufficient present recollection to enable him to testify fully and accurately, and the statement is contained in a writing which: [¶] (1) Was made at a time when the fact recorded in the writing actually occurred *or was fresh in the witness' memory*; [¶] (2) Was made (i) by the witness himself or under his direction or (ii) by some other person for the purpose of recording the witness' statement at the time it was made; [¶] (3) Is offered after the witness testifies that the statement he made was a true statement of such fact; and [¶] (4) Is offered after the writing is authenticated as an accurate record of the statement." Juarez argues on appeal that the exception does not apply, because the facts of the oral copulation recorded in the writing were no longer fresh in Erin M.'s memory, because Lague examined Erin M. over a month after the abuse allegedly occurred and a month after Dawn M. discovered the sores on Erin M.'s genitals.

The hearsay exception pursuant to section 1237 does not apply, because Erin M. had sufficient "present recollection to enable [her] to testify fully and accurately" about the oral copulation. Erin M. testified from her recollection at trial. The admission of her statements to Lague under section 1237 was harmless error, given Erin M.'s detailed trial testimony. Even if Lague's testimony had been excluded, Erin M. testified at trial that Juarez had licked her genital area, and there was ample supporting evidence that she had contracted herpes type 1 from Juarez as a result. The case did not hinge on Lague's testimony, and it is not reasonably probable that the exclusion of Lague's testimony would have resulted in Juarez's acquittal. (See *People v. Parks* (1971) 4 Cal.3d 955, 961.)

II. Exclusion of Colleen Juarez's lay opinion testimony

Juarez argues that the trial court erred in refusing to allow Colleen to testify that because the house was so small, she would have been aware that Juarez was performing oral sex on Erin M. in the girls' bedroom. During Colleen's testimony, defense counsel asked her "Do you have an opinion based upon the smallness of the house and your experience with the noise whether, if something like that would happen, you would become aware of it?" Colleen answered "yes." The prosecution objected that the question "calls for speculation," and the court agreed and struck the testimony.

When a witness is not testifying as an expert, "his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is: [¶] (a) Rationally based on the perception of the witness, and [¶] (b) Helpful to a clear understanding of her testimony." (Evid. Code § 800.) Evidence Code section 702 states that a witness' testimony "concerning a particular matter is inadmissible unless he has personal knowledge of the matter." Evidence based on speculation "is irrelevant because it has no tendency in reason to resolve questions in dispute." (*People v. Chatman* (2006) 38 Cal.4th 344, 382.)

"We review for an abuse of discretion a trial court's ruling that a question calls for speculation from a witness." (*People v. Thornton* (2007) 41 Cal.4th 391, 429.) The question called for Colleen to give her opinion about whether she would have been aware

of Juarez performing oral sex on Erin M. in the girls' bedroom. The entire defense case was that Juarez had not performed oral sex on Erin M.; Colleen therefore would not have personal knowledge of what sounds such an event would create. Further, for her to have become aware that "something like that" was happening, Colleen would have had to investigate, requiring her to testify that not only would she have perceived something, but she would have gone to see what was going on.

A lay witness may testify to an opinion about something the lay witness actually perceived, and a lay opinion is helpful "when the matters observed by the witness may be too complex or subtle to enable the witness accurately to convey them without resorting to the use of conclusory descriptions." (*Osborn v. Mission Ready Mix* (1990) 224 Cal.App.3d 104, 112.) Colleen, however, had not observed anything about which she could express a helpful lay opinion. The question was whether she had an opinion that she *would* have observed (and investigated) sounds that Juarez was performing oral sex on Erin M. in the girls' bedroom. She had never actually perceived such an act, and so her lay opinion about whether she would have heard it, and would have become aware of what was happening, would have been speculation. The trial court did not abuse its discretion in excluding the testimony as speculative. (See *People v. Thornton*, *supra*, 41 Cal.4th at p. 429 ["Under that deferential standard, we cannot second-guess the court's ruling that asking the witness whether she thought the two vehicle occupants were acting as if they knew each other was speculative."].)

In addition, even if the trial court erred in excluding the testimony, the error was harmless. Colleen testified at length about the close quarters in the house. She testified that the house was small, that she would close the door to the master bedroom when she and Juarez engaged in sexual activity, that she was a light sleeper who heard everything, that she could hear sounds coming from the girls' bedroom, and that it would be "insane" for Juarez to commit the molestation in the girls' bedroom because the house was so small and "[y]ou can hear everything that happens." The defense theory that Juarez could not have evaded detection in the small house was thoroughly presented in her testimony (as well as in Juarez's testimony and the photographs and diagram introduced

into evidence), and the excluded opinion testimony would not have added much except speculation. The evidence of Juarez's guilt was strong, and the defense made as much as it could of the size of Juarez's house and the possibility of discovery. It is not reasonably possible that allowing the excluded opinion testimony would have changed the result.

III. Testimony regarding why Juarez's daughter E.J. would not be a witness

During Juarez's testimony, his counsel asked him "Has there been a decision by you and your wife with reference to calling as witnesses your two children? [¶] . . . [¶] Well, let's just start with little [E.J.] Has there been a decision not to call her as a witness?" Juarez answered "That is correct," and his counsel asked "And is that based upon a recent medical problem?" The prosecution objected "Your honor, there would be an objection as to why a witness is not being called. If a witness is unavailable, a witness is unavailable." The trial court sustained the objection.[3]

A witness is unavailable under Evidence Code section 240, subdivision (a)(3) if the witness is "unable to attend or to testify at the hearing because of then existing physical or mental illness or infirmity." The question posed by Juarez's counsel necessarily asked for a hearsay response, as Juarez would have had to testify regarding the contents of an out-of-court conversation with Colleen, and would have offered the contents for its truth. The testimony was properly excluded as inadmissible hearsay.

Further, the trial court never ruled that E.J. was unavailable as a witness, and no hearing was held regarding her availability. There is no determination in the record whether she was actually unavailable and on what ground, so Juarez has not shown that the excluded testimony would be relevant. Although the prosecutor did ask, during cross-examination of Colleen, whether she was aware "that the people of the State of California cannot compel the youngest child to come testify", without evidence in the

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[3] The prosecutor apparently believed that E.J. was unavailable because E.J. was a possible victim of sexual assault and therefore could not be compelled to testify. (See Code Civ. Pro. § 1219.) On appeal, however, Juarez states that the reason E.J. did not appear as a witness was because she had been diagnosed with muscular dystrophy, and was too ill to testify. There was no offer of proof at trial regarding such a diagnosis, and we do not consider it on appeal.

record that there was another reason for her nonappearance, Juarez cannot complain that he was precluded from presenting that alternative explanation.

Even if it was error to exclude the testimony about E.J., it was harmless. Juarez claims that E.J.'s testimony would presumably have been "exculpatory," meant to rebut Lague's testimony that her examination had raised "red flags" regarding possible molestation. It was not E.J.'s supposedly exculpatory testimony that was excluded, however, but an explanation for her absence that had no foundation in the record. Allowing Juarez to testify that E.J. was ill would not have tended to exonerate him regarding his molestation of Erin M., especially given the strong evidence of guilt. It is not reasonably probable that Juarez would have been acquitted had he been allowed to testify that his younger daughter was not testifying due to illness.

VI. The presence of Erin M.'s parents in the courtroom

Juarez argues that it was error for the trial court to allow Erin M.'s parents to remain in the courtroom after Erin M.'s and Dawn M.'s testimony had concluded. There was no error.

After Dawn M. testified, she remained in the court room as a support person for Erin M. during her testimony. John M., Erin M.'s father, was not present.

The next day of trial, outside the presence of the jury, the prosecutor informed the court that there was a standing motion to exclude, and that defense counsel objected to the continued presence of Dawn M. in the courtroom. The prosecutor stated: "It's my position she's already testified in the matter and she should be allowed to remain." Defense counsel argued: "There would be a strong opposition. She may be called back in reference to this matter. We have significant impeachment witnesses that would indicate that she fabricated certain things in reference to this case. At least three witnesses will be testifying in reference to that." Defense counsel indicated that Erin M.'s father could also be a potential witness, and the prosecutor stated that she had placed his name on the witness list "just because his name might come up," but he had not been interviewed and she did not intend to call him. Defense counsel continued to argue that John M. might be called as a rebuttal witness, and because Erin M. was no

longer on the stand, it was inappropriate for either parent to be in the room because they might be called back.

The prosecutor responded: "Well, your honor, if he's already asked her the questions which he plans to impeach her on, there's no reason for her to be recalled. She's already been confronted." The trial court stated: "I would agree. I don't see a reason for her to be excluded because the bottom line is even if she's recalled, she's going to be told what the statement was in court by someone that said something different than her to get a response. [¶] You've got your testimony on the record. She is the victim's mother. I can understand her wanting to be present for the case." The court asked the prosecutor to advise Dawn M. that when defense witnesses were testifying, "[t]here is to be no emotional reaction from anyone in the audience." The father had not been interviewed, and the court saw no reason to exclude him. Krysta M., Dawn M. and John M.'s other juvenile daughter, testified that day.

During a break after the prosecution rested, defense counsel pointed out that Dawn M. and Krysta M. had already testified, and the defense intended to put on an impeachment defense: "If they are going to remain, that is the risk the attorney takes." The court responded: "If they are going to testify again, it is going to be by the People. Let's not anticipate the problem. The jury saw they sat in the courtroom during the testimony."

Defense counsel advised the court that Erin M.'s father was in the courtroom before the second day of the defense case, and stated: "I'm asking, in an abundance of caution, because there has been testimony that he was present at certain time periods that may be very critical, that he not be permitted to stay." The prosecution repeated "I have no intention of calling him as a witness." The court ruled that John M. could stay in the courtroom. Dawn M. was not recalled, and John M. was not called to testify.

We review the trial court's ruling on the motion to exclude witnesses for an abuse of discretion. (*People v. Griffin* (2004) 33 Cal.4th 536, 574.) Under Evidence Code section 777, "the court may exclude from the courtroom any witness not at the time under examination so that such witness cannot hear the testimony of other witnesses." "The

purpose of the order [excluding witnesses] is to prevent tailored testimony and aid in the detection of less than candid testimony." (*People v. Valdez* (1986) 177 Cal.App.3d 680, 687.)

Juarez does not explain how the decision to allow John M. and Dawn M. to stay was an abuse of discretion. Dawn M. had already testified, and had been questioned on the issues for which the defense presented impeachment testimony. Further, John M. was not interviewed by the prosecution or the defense, and was not on the defense witness list. We see no abuse of discretion in the trial court's denial of the motion to exclude Dawn M. and John M. from the courtroom.

Further, even if the trial court erred, the error was harmless, because Juarez has shown no prejudice from the presence of Dawn M. and John M. in the courtroom. The defense did not recall Dawn M., and Juarez does not claim the defense would have recalled her had she not remained in the courtroom. Juarez's argument that John M.'s value to the defense was "compromised" is belied by the defense's failure to indicate any interest in his testimony; the defense never interviewed John M. or put him on the witness list, and John M. never testified for the prosecution. If the defense had decided to recall Dawn M. or call John M. as a witness, counsel could have questioned them regarding any effect their presence in the courtroom may have had on their testimony.

V. Jury instructions

The jury was instructed: "It is alleged that the crime occurred on or between April 10, 2006 and April 17, 2006. The People are not required to prove that the crime took place exactly on a particular day, but only that it happened reasonably close to that day." Juarez argues this instruction was error, because the instruction should have stated that the last day was April 15, 2006, the last day that Erin M. stayed at the Juarez home. Further, Juarez argues that his defense expert, Dr. Bierman, established that the incubation period for herpes was 5–7 days, and so the exact date of the molestation was important to establish that Erin M.'s outbreak occurred within the incubation period.

Juarez's counsel joined with the prosecution in requesting the instruction. When the trial court asked, "So you want it that 'it is alleged a crime occurred on and between

April 10, 2006 and April 17, 2006'?," defense counsel responded, "I believe it's more accurate, your honor." The court repeated, "I take it you both want it to be worded "'As alleged a crime occurred on and between April 10, 2006 and April 17, 2006?'" Defense counsel stated, "Yes, your honor," and the trial court stated, "Okay, I'll modify it so that it reads the way you both want." The record shows that defense counsel joined in requesting the instruction and in approving its language and the dates, and "[t]he claims of error are therefore waived" as to the instruction. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1223.)

We acknowledge that the testimony at trial was that Erin M. stayed at the Juarez home from Monday, April 10, 2006 to Saturday, April 15, 2006, rather than April 17, 2006 as stated in the instruction. Generally, the prosecution is not required to prove the exact date on which the offense occurs, unless "the defense is alibi [so that] the exact time of commission becomes critically relevant to the maintenance of the defense." (*People v. Richardson* (2008) 43 Cal.4th 959, 1027.) Juarez did not raise an alibi defense. Nevertheless, the date of the offense was important, as it established the time of Erin M.'s exposure to the herpes virus. Dawn M. discovered the blisters on Erin M.'s genitals on April 22, the following Saturday. Katherine testified that Dawn M. called her on April 22, upset and crying about her discovery. Dawn M. took Erin M. to urgent care the next day and had Erin M. tested. The following Wednesday, April 26, Erin M. saw Dr. Welles, who reviewed the test results, and found they were positive for herpes type 1.

There was no dispute at trial that the date that Dawn M. discovered the blisters on Erin M.'s genitals was Saturday, April 22, 2006, or that the dates that Erin M. slept over at the Juarez home were April 10, 2006 through April 15, 2006. The outbreak of the virus on that date is consistent with Dr. Bierman's estimate of a 5–7 day incubation period. Further, the prosecution introduced into evidence, on cross-examination of Dr. Bierman, the CDC's estimate that the first outbreak usually occurred within two weeks of the transmission of the virus. The CDC estimate of an incubation period is consistent with an outbreak on the 22d, whether the offense occurred as early as April 10, 2006 or as late as April 15, 2006. Any error was harmless, because the jury's verdict was

consistent with a conclusion that the outbreak on April 22, 2006 was the result of oral copulation by Juarez during the period from April 10, 2006 and April 15, 2006, within the timeframe in the instruction, when undisputed evidence established that Erin M. stayed at the Juarez home.

VI. Substantial evidence

Juarez argues that inconsistencies in Erin M.'s testimony, and medical evidence that Erin M. had a preexisting case of herpes, show that his conviction was not supported by substantial evidence. We disagree. Substantial evidence supports the conviction.

Evidence is sufficient to support a conviction if, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, and we "'''''presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.'''''' (*People v. Mejia* (2007) 155 Cal.App.4th 86, 93.) "In deciding the sufficiency of the evidence, a reviewing court resolves neither credibility issues nor evidentiary conflicts. [Citation.] Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. **[**Citation.] Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction. [Citation.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

A. Inconsistencies in testimony

Juarez begins by labeling Erin M.'s testimony inconsistent and "unbelievable." To the contrary, the examples Juarez gives do not dilute the strength of Erin M.'s testimony that Juarez orally copulated her. Juarez labels as "a shocking admission" Erin M's answer "[n]ot really" in response to defense counsel's question, "[W]e're talking about the time he was in the bedroom. Do you remember this?" The trial transcript shows, however, that defense counsel was not asking Erin M. about whether the molestation occurred, but about whether she remembered her preliminary hearing testimony, during which she had answered, "Right" when asked, "Now, when Gil did this to you, it was a long time, is that right?" Erin M.'s answer related to her testimony at the

preliminary history, not the oral copulation. This was not inconsistent with her testimony that Juarez orally copulated her.

Juarez points to this questioning by the prosecution as ambiguous whether Dawn M. had coached Erin M. to say that Juarez molested her: "Q: Did your mom ever say to you, I want you to tell them that Gil did this to you? A: I don't remember. Q: You don't remember her ever saying that? A: No." This exchange was followed, however, by more testimony:

Q. Your mom told you that I want you to come to court?

A. I think so.

Q. Your mom said, I want you to tell the truth?

A. Yeah.

Q. You wouldn't lie just to try to make mom happy, would you?

A. No.

Q. Because you understand that this is really important, right?

A. Yes.

Q. Because we're in court, right?

A. Yes.

Q. And you wouldn't lie to the judge or to all these people in here, would you?

A. No.

Q. And a[re] you absolutely sure about what you remember? Are you sure that Gil licked your privates?

A. Yes.

In context, Erin M. stated simply that she did not remember Dawn M. telling her to accuse Juarez, and because she testified that her mother told her to tell the truth in court, the jury was entitled to conclude that Dawn M. did not coach Erin M.

Juarez complains that Dr. Welles testified that Erin M. told her that her godfather had molested her, although Juarez was not godfather to Erin M., but to Krysta M., her older sister. Dr. Welles's actual testimony was "I asked Erin to tell me about it, and she told me that her godfather, *Mr. Juarez*, would put his mouth against her vagina or vaginal

area." Whether Dr. Welles was confused by what Erin M. told her, or whether Erin M. mistakenly identified Juarez as her godfather to Dr. Welles, this is not an inconsistency that casts doubt on Dr. Welles's testimony or Erin M.'s testimony, given that Erin M. consistently identified Juarez by name as her molester.

Juarez also argues that Erin M. testified that she did not wear underwear when sleeping at the Juarez home, but Dr. Welles testified that Erin M. told her that Juarez "would come into the room and that he would remove her underwear and that he put his mouth against her vaginal area." Erin M. also testified, however, that she did not remember how her "bottoms" came off that night. Erin M. did not testify whether she removed her own underwear that night, and a jury could reasonably infer from her testimony that Juarez removed her underwear when he put her to bed, and then orally copulated her.

All these inconsistencies are either nonexistent or minor, and we do not resolve credibility issues or evidentiary conflicts on appeal. (*People v. Young*, *supra*, 34 Cal.4th at p. 1181.) Juarez has not shown that any of the challenged testimony is inherently improbable or physically impossible. (See *ibid.*)

B. Evidence that Erin M. had a preexisting case of herpes

Juarez argues that "the evidence is clear that she had a preexisting case of herpes 1 infection at the time of the alleged abuse by Gilbert Juarez." This misstates the record and mischaracterizes the testimony at trial.

Ample evidence supported the jury's finding that Erin M. contracted herpes type 1 on her genitals when Juarez orally copulated her, rather than from her own preexisting infection. Nothing in the record conclusively established that Erin M. had a preexisting case of herpes type 1 before April 2006. Dawn M. and Krysta M. testified that Erin M. had not had a cold sore before April 2006. Erin M.'s medical records were discussed in detail, and nothing in the records established that Erin M. had herpes before April 2006. In 2004, the rash on Erin M.'s tongue was tested for herpes and the results were negative. Dr. Welles and the defense expert, Dr. Bierman, agreed that it was most likely that the April 2006 genital outbreak was Erin M.'s first outbreak, not a recurrent outbreak.

Although the defense attempted to establish that Erin M. had infected her own genital area with herpes type 1 by transferring the virus from her mouth, that defense failed. Even Dr. Bierman concluded "the most reasonable explanation for this child having oral herpes on her genitals is that she was orally copulated like she said she was between April 10 and 15." To the extent there was a conflict in the evidence, the jury was entitled to resolve it, and we will not disturb the jury's conclusion that Erin M. contracted the herpes type 1 virus from Juarez when he orally copulated her.

Substantial evidence supports the jury verdict.

VII. Ineffective assistance of counsel

On direct appeal and in the consolidated petition for writ of habeas corpus, Juarez claims that his trial counsel provided ineffective assistance.

"In order to establish a claim of ineffective assistance of counsel, defendant bears the burden of demonstrating, first, that counsel's performance was deficient because it 'fell below an objective standard of reasonableness [¶] . . . under prevailing professional norms.' [Citations.] Unless a defendant establishes the contrary, we shall presume that 'counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy.' [Citation.] If the record 'sheds no light on why counsel acted or failed to act in the manner challenged,' an appellate claim of ineffective assistance of counsel must be rejected 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.' [Citations.]' If a defendant meets the burden of establishing that counsel's performance was deficient, he or she also must show that counsel's deficiencies resulted in prejudice, that is, a 'reasonable possibility that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' [Citation.]" (*People v. Ledesma* (2006) 39 Cal.4th 641, 745–746.) "'[W]e accord great deference to counsel's tactical decisions' [citation], and we have explained that 'courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight [citation].'" (*People v. Weaver* (2001) 26 Cal.4th 876, 925–926.)

We address each basis for this claim in turn.

A. Failure to request a jury visit to the Juarez home

Juarez argues that it was fundamental to his defense to establish that it was improbable that he could have orally copulated Erin M. in the house without detection, given the house's layout and size. It was "absolutely vital" that the jury see the house for itself, and so the failure of defense counsel to request a visit was ineffective assistance of counsel.

Section 1119 provides: "When, in the opinion of the court, it is proper that the jury should view the place in which the offense is charged to have been committed, or in which any other material fact occurred, . . . it may order the jury to be conducted in a body, in the custody of the sheriff or marshal . . . to the place . . . ." The trial court has discretion whether or not to grant a motion for a jury view. (*People v. Friend* (2009) 47 Cal.4th 1, 47.) """When the purpose of the view is to test the veracity of a witness's testimony about [his or her] observations, the trial court may properly consider whether the conditions for the jury view will be substantially the same as those under which the witness made the observations, whether there are other means of testing the veracity of the witness's testimony, and practical difficulties in conducting a jury view." (*Ibid.*)

The purpose of the jury view would be to test the veracity of Erin M.'s testimony that Juarez orally copulated her at night in the girls' bedroom. It is Juarez's burden, in alleging that his counsel was ineffective for failing to request such a view, to demonstrate that the conditions for the jury view at the time of trial in 2009 were "substantially the same" as the conditions in 2006, when the alleged molestation occurred. (See *People v. Friend, supra,* 47 Cal.4th at p. 47 [no abuse of discretion to deny request for jury view when "it was uncertain how close the conditions the jury would have encountered would have been to those under which [the witness] made his observations four years earlier"].) Juarez does not address whether the conditions in the Juarez home were the same two years later. Further, Erin M. testified that the oral copulation took place at night, and to the extent that visibility is in issue, it would be necessary for the jury to view the house at night to duplicate the conditions of the alleged molestation. (*Id.* at p. 48 [visibility is affected by both lighting and distance].) Finally, "alternative means of testing [Erin

M.'s] credibility were provided at trial by various witnesses" (*ibid.*), as both Colleen and Juarez testified to the small size of the house and the way noise carried from one end to the other. The record is silent with regard to what, if any, noises the oral copulation would have generated and, if any, how loud the noises would have been.

The defense introduced two diagrams and seventeen photographs of the Juarez home, and examined Colleen at length about the house. This was ample evidence for the jury to assess the scene of the offense. The exhibits and testimony enabled the jury "to draw its own inferences about the probability defendant was capable of committing the crime" without a jury view. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) Juarez has not shown that the trial court would have abused its discretion in failing to order a jury view, had counsel made a motion.

We presume that counsel had a tactical reason for not requesting a view, and because the record sheds no light on why counsel did not, we reject the claim of ineffective assistance on this ground, as there are a variety of satisfactory explanations for why he may not have considered that one was required.

B. Failing to object to Dawn M.'s testimony

Juarez claims that trial counsel was ineffective in failing to object on hearsay grounds to Dawn M.'s testimony that Erin M. told her "Gil licked me there," when Dawn M. saw the outbreak on Dawn M.'s genitals. Juarez argues that it was inadmissible hearsay "offered to prove the truth of the matter stated" under Evidence Code 1200, and that it was inadmissible and highly prejudicial.

During Dawn M.'s testimony, the prosecutor asked her what she did after she saw the condition of Erin M.'s genital area, and Dawn M. responded that Erin M. said, "Gil licked me there." Defense counsel did not object. The prosecutor then asked Dawn M. what she did after she heard this, and Dawn M. testified that she called Katherine Fidermutz, "hysterical," and told Katherine what Erin M. had told her.

Hearsay is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid.

Code §1200, subd. (a)). Hearsay evidence is inadmissible except as provided by law. (*Id.*, subd. (b).)

Juarez argues that the statement was inadmissible hearsay. Respondent argues that the testimony was admissible, because it was not offered for the truth of Erin M.'s accusation that Juarez had molested her, but rather as "foundational evidence to explain Dawn's subsequent conduct." Erin M.'s statement had evidentiary value to explain why Dawn M. called the Fidermutz house, called the Fidermutzes on vacation, and behaved in an emotional way. These were issues at trial, and defense counsel could reasonably have determined that objecting to the admission of the statement on hearsay grounds was not worth the risk of being perceived by the jury as attempting to hide evidence.

Further, Dawn M.'s testimony that Erin M. disclosed the oral copulation to her would have been admissible for the nonhearsay purpose of establishing the fact of, and the circumstances surrounding, Erin M.'s disclosure of the molestation to others. (See *People v. Brown* (1998) 8 Cal.4th 746, 749–750.) Even if defense counsel had successfully objected, the jury would have heard Dawn M.'s testimony regarding Erin M.'s complaint, with an instruction limiting the testimony to the fact of the disclosure and the circumstances under which it occurred.

"We have long recognized that counsel's decision whether or not to object to inadmissible evidence is a matter of trial tactics. [Citation.] Because we accord great deference to trial counsel's tactical decisions, counsel's failure to object rarely provides a basis for finding incompetence of counsel. [Citations.] Here, nothing in the record suggests defense counsel lacked a rational tactical reason for not objecting to [the] testimony." (*People v. Lewis* (2001) 25 Cal.4th 610, 661.) Counsel may well have concluded that objection was futile, given that the testimony was arguably admissible to explain Dawn M.'s subsequent conduct, or to show the fact that Erin M. had disclosed the molestation and the circumstances under which the disclosure occurred.

Further, given the cumulative effect of so much testimony that Erin M. identified Juarez as her molester, there is no reasonable possibility that the outcome would have been different if counsel had objected and Dawn M.'s testimony had been excluded as

hearsay. Erin M. herself testified that she told her mother that Gil had licked her, and Dr. Welles testified that Erin M. told her the same thing. The failure to object was not ineffective assistance of counsel.

C. Failure to subpoena Dr. Nichols

Juarez argues that trial counsel was ineffective because he failed to subpoena as a witness Doctor Nichols, who he claims believed Erin M. had herpes on her tongue in September 2004, until a test of a culture of the lip came back negative. Trial counsel asked Dr. Bierman, the defense expert, about Dr. Nichols's report, and Dr. Bierman stated that the report showed "a diagnosis entered of HSV, herpes simplex virus." When trial counsel asked if the diagnosis was written out, the prosecution objected on hearsay grounds and argued the evidence was misleading. The court ruled that without the other doctor available for cross-examination by the prosecution, "what can come in is that they did an analysis and it came back negative." Because "the doctor could have been brought in," the court sustained the prosecution's objection.

"On direct appeal, a claim of ineffective assistance of counsel cannot be established by mere speculation regarding the 'likely' testimony of potentially available witnesses. [Citation.]." (*People v. Medina* (1995) 11 Cal.4th 694, 773.) There is no evidence that Dr. Nichols was ready to testify, or that he would necessarily testify that despite the negative test result, he believed Erin M. had herpes on her tongue in 2004. In fact, it is likely that defense counsel saw the pitfall inherent in subpoenaing a doctor to testify that Erin M. had herpes in 2004, when the test results showed otherwise. It is speculation to assume that the testimony would have helped the defense, because it would also have emphasized the negative test results.

Juarez argues that the test might have been a "false negative," but this misstates Dr. Bierman's testimony regarding the occurrence of false negatives. His estimate that false negatives occur in half of the tests was for *genital* herpes, type 2, whereas Erin M. had been infected with herpes type 1.

It was not ineffective assistance for trial counsel not to subpoena Dr. Nichols.

D. Failing to call Juarez's therapist as a witness

In his habeas petition, Juarez alleges that it was ineffective assistance for trial counsel not to call as a witness Ronald Korn. Juarez states in a declaration that while he was out on bail, he retained Korn as a therapist, whom he visited over 30 times between July 2006 and November 2007, a sixteen-month period. Juarez told his trial counsel that Korn would testify that Juarez "did not have the characteristics of a pedophile or child molester," but trial counsel did not interview Korn "despite my begging him to do so." Juarez also provides a declaration from Korn, in which he describes himself as "licensed in the State of California as a Marriage and Family Therapist" with a master's in clinical psychology from California State University, Los Angeles. Korn states that over 32 visits "I had the opportunity to interview, test, judge and otherwise psychologically examine Mr. Juarez." Although he was prepared to testify at trial, Juarez's trial counsel never contacted him.

Counsel's decision whether to put on a witness is a matter of trial tactics and strategy, which we will generally not second-guess. (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1059.) A defendant accused of a sex offense may present expert testimony to establish, through such things as personality tests, that he does not have a disposition to commit the crime. (*People v. Stoll* (1989) 49 Cal.3d 1136, 1153, 1157–1158.) Such expert opinion is character evidence, relevant as circumstantial evidence that a defendant is unlikely to have committed the charged acts. (*Id.* at p. 1158.) Although Korn's resume does not show any special expertise in treating or evaluating sex offenders or child molesters, his testimony may have been admissible at trial as character evidence. We note, however, that his declaration is vague regarding how he evaluated Juarez, stating merely that he had the opportunity to test and psychologically examine Juarez. It is not clear from the declaration or from his resume what tests he may have performed.

We cannot say, however, that trial counsel was ineffective in failing to present Korn as a witness. Trial counsel may have made a tactical decision not to present additional character evidence regarding Juarez. Without more detailed information about what the basis for Korn's trial testimony would have been, we cannot say whether it

would have been admitted or whether it would have been helpful to Juarez's defense. The evidence against Juarez was strong, and the jury "'may temper their acceptance of [a witness's] testimony with a healthy skepticism born of their knowledge that all human beings are fallible.'" (*People v. Stoll, supra,* 49 Cal.3d at p. 1157.) Given the strength of the evidence against Juarez, it is particularly true here that a jury might tend to disregard character evidence from a therapist who treated Juarez after the alleged molestation. Further, defense counsel may have decided not to present such testimony so as not to prompt the prosecution to present its own evidence regarding the characteristics of child molesters, or to avoid cross-examination which might diminish the weight of the evidence or discredit it altogether. Juarez does not establish that there was no satisfactory explanation for the failure to call Korn as a defense witness, and we decline to second-guess trial counsel's presumed tactical decision.

Further, we repeat that there was strong evidence of Juarez's guilt. It is not reasonably probable that Korn's testimony, judged by the scant information in his declaration, would have resulted in Juarez's acquittal.

E. Failing to object to coaching by Dawn M.

In his habeas petition, Juarez alleges that his trial counsel was ineffective for failing to object when Dawn M. "coached" Erin M. from the courtroom audience during Erin M.'s testimony. Juarez's accompanying declaration states that "I happened to turn towards the audience and saw that Erin [M.]'s mother, Dawn [M.], was 'mouthing' answers to her daughter while she was on the stand, and was nodding her head up and down and side to side to prompt her daughter's answers." Juarez states that he advised his trial counsel, who did not object or bring it to the judge's attention. Juarez also includes a declaration from his mother, in which she states that she also observed Dawn M. coaching Erin M.

Defense counsel did, however, address the coaching issue when, during cross-examination, he had the following exchange with Erin M., after Erin M. testified that Dawn M. cried when she discovered the outbreak of blisters on Erin M.'s genitals:

Q. Do you love your mother very much?

A. Yes.

Q. Do you want to please her?

A. Huh?

Q. Do you want to make her happy?

A. Yes.

Q. Is that very important to you?

A. Yes.

Shortly thereafter, counsel continued:

Q. Have you ever told your mother what happened to you, other than that first time?

A. I think.

Q. I notice that you're looking at your mother right now; right?

A. Yeah.

Q. You look at her and then you get a little nervous.

A. Yes.

Q. I'm sorry, go ahead. You don't want to say anything that makes her angry, do you?

A. Huh?

Q. You don't want to make her angry, do you?

A. No.

Q. Why don't you?

A. Because I'm nice to her.

Q. Hummm?

A. I'm nice to her.

This exchange establishes that counsel was aware that Erin M. was looking at Dawn M., and chose to address the issue of coaching gently, in the context of his cross-examination of a ten-year-old testifying to the details of oral copulation. We presume that trial counsel considered it sound trial strategy not to object, but rather to draw the jury's attention to the communication between Erin M. and her mother Dawn M. without

attacking Erin M. Juarez argues that if the jury had been aware of the coaching, it would have affected their view of Erin M.'s and Dawn M.'s credibility. The record shows that trial counsel made the jury aware of the coaching, and the jury had the opportunity to decide whether it affected their evaluation of Erin M.'s and Dawn M.'s testimony. It was not ineffective assistance for counsel not to make a formal objection to the alleged coaching.

F. Failure to call character witnesses

In his habeas petition, Juarez also contends that trial counsel was ineffective in failing to call "numerous" character witnesses on his behalf, including three who provided declarations, although he gave trial counsel a list of possible positive character witnesses. One potential witness states that she knew Juarez through the PTA, and that she would have testified that Juarez was an excellent father and family man. Although she contacted his trial attorney to let him know that she was willing to appear as a character witness, she was never contacted. Two other declarations from a member of Juarez's church and from a close friend state that the declarants would have testified on his behalf, although neither contacted Juarez's attorney.

Whether to call a witness is a question of trial strategy, which we do not second-guess, and where (as here) the record does not establish why counsel failed to act, we reject a claim of ineffective assistance "'unless there simply could be no satisfactory explanation.'" (*People v. Ledesma*, *supra*, 39 Cal.4th at p. 746.) There are myriad possible satisfactory reasons why counsel did not call the character witnesses, only one of whom had contacted him. The record shows that defense counsel did prepare some character witnesses, and then decided not to present their testimony. There was testimony at trial to Juarez's good character from his wife Colleen and from Katherine Fidermutz. The alleged abuse occurred within a circle of families who were long-time friends; Juarez was even Krysta M.'s godfather. The prosecution's theory was that regardless of his seeming good character, Juarez exploited a position of trust to molest a child who was close to his family and who trusted him. It is not reasonably possible that

more character witnesses would have resulted in a jury determination that Juarez was innocent.

G. Defense counsel's "guarantee"

Juarez's final contention in his petition for habeas relief is that his trial counsel guaranteed him that he would win at trial, convincing Juarez not to accept a plea offer. Juarez's declaration states that in negotiations before trial, defense counsel told him not to take any deals and to proceed to trial, because the case against him was weak. The record shows that before the jury was called into the courtroom on the first day of trial, the trial court reiterated the prosecution's offer of a maximum sentence of six years. The court advised Juarez that he was facing a possible life sentence, and he might want to consider the deal, although he did not know if it was a good offer. The prosecution stated that the deal "was actually going to be withdrawn once we were sent out. But if Mr. Juarez has a change of heart before the jury comes in . . ." Juarez's counsel told the court "I have had a lengthy discussion, as the court would expect, about the potential consequences of this matter, numerous times, and he's been aware of the offer. I'll discuss it with him again. . . . But it's his decision."

During a short break, Juarez states, his counsel told him he would "'guarantee we will win this thing! Don't take the deal. She [the D.A.] is offering you this chance, at this late date, which is very unusual at this late time, because she has nothing to convict you. You will be found "not guilty." We have a strong defense.'" Juarez claims that were it not for his counsel's advice and guarantee, he would have taken the plea, because he would not have faced a life sentence.

To establish ineffective assistance of counsel in the context of a defendant's rejection of a proffered plea bargain, a defendant must first establish not that counsel's advice was right or wrong, but that the advice was outside the range of competence demanded of trial counsel. (*In re Alvernaz* (1992) 2 Cal.4th 924, 937.) "We caution that a defense attorney's simple misjudgment of the strength of the prosecution's case, the chances of acquittal, or the sentence a defendant is likely to receive upon conviction, among other matters involving the exercise of counsel's judgment, will not, without

more, give rise to a claim of ineffective assistance." (*Ibid.*) "'It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence.'" (*Id.* at p. 938, quoting *Strickland v. Washington* (1984) 466 U.S. 668, 689.) "[A] court should scrutinize closely whether a defendant has established a reasonable probability that, with effective representation, he or she would have accepted the proffered plea bargain." (*Ibid.*) "[P]ertinent factors to be considered include: whether counsel actually and accurately communicated the offer to the defendant; the advice, if any, given by counsel; the disparity between the terms of the proposed plea bargain and the probable consequences of proceeding to trial, as viewed at the time of the offer; and whether the defendant indicated he or she was amenable to negotiating a plea bargain. In this context, a defendant's self-serving statement—after trial, conviction, and sentence—that with competent advice he or she *would* have accepted a proffered plea bargain, is insufficient in and of itself to sustain the defendant's burden of proof as to prejudice, and must be corroborated independently by objective evidence. A contrary holding would lead to an unchecked flow of easily fabricated claims." (*Ibid.*)

Juarez does not state that counsel failed to communicate the offer to him. He complains that counsel gave him the wrong advice. There is nothing in the record, however, to indicate that Juarez ever was amenable to pleading guilty. As a result, his contention that he would have pleaded guilty if counsel had not assured him he would win at trial is exactly the sort of "self-serving statement" which, lacking independent corroboration by objective evidence, is insufficient to establish prejudice for the purpose of a successful claim of ineffective assistance. Juarez maintained his innocence throughout and testified "I am telling you the truth . . . I did not do this. This was something that I would not even think of doing. It's never even crossed my mind." "[A] defendant's trial protestations, under oath, of complete innocence may detract from the credibility of a hindsight claim that a rejected plea bargain would have been accepted had a single variable (sentencing advice) been different." (*In re Alvernaz, supra,* 2 Cal.4th at

p. 940.) We reject Juarez's claim that his counsel's advice on the plea bargain was ineffective assistance.[4]

DISPOSITION

The judgment is affirmed. The petition for writ of habeas corpus is denied.

NOT TO BE PUBLISHED.

JOHNSON. J.

We concur:

MALLANO, P. J.

CHANEY, J.

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[4] We note that Juarez's appellate counsel represented Juarez when he filed a new trial motion, which raised all the claims Juarez raises on appeal with the exception of his claim that trial counsel guaranteed him he would be acquitted and convinced him not to plead guilty.